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ABSTRACT

The document is a report on the adequacy of existing procedures for resolving disputes arising out of consumer transactions. It is primarily concerned with problems of the consumer who receives defective goods or services and so suffers economic loss. Focusing on four types of dispute resolution, the document presents its findings and recommendations for the improvement of each type: (1) business-sponsored mechanisms--not a reliable method of consumer redress in fraud cases or nonfraud cases where the businessman believes he is correct and a large amount is at stake, (2) arbitration--a possible alternative method where disputes cannot be resolved by negotiation and are referred to an impartial arbitrator for a final and binding decision, (3) small claims courts--provide speedy and inexpensive justice for the litigants who could not afford a lawyer, and (4) consumer class actions--a controversial approach to judicial remedies for consumer grievances which can be abused by lawyers or can be helpful to consumers who have been injured but often do not bring cases on their own. Separate statements by members of the Board of Directors for the National Institute for Consumer Justice present different viewpoints on the four methods of resolving consumer grievances. (Author/EC)

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REDRESS OF CONSUMER GRIEVANCES

Report Of
The National Institute for Consumer Justice

CE 006611

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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FOREWORD

The National Institute for Consumer Justice, established at the suggestion of the President in February, 1971, as a non-profit corporation of the District of Columbia, submits herewith its Report including its findings and recommendations as to the adequacy of existing procedures for resolving disputes arising out of consumer transactions. The Institute's studies, enumerated in the Report, contain data relied upon by the Institute. Those studies will be made publicly available, and we hope that they will be useful to others who continue to consider this important subject.

In view of the limited resources and time available to it, the Institute decided to focus its Report on four topics with respect to the resolution of consumer disputes: (1) business-sponsored mechanisms, (2) arbitration, (3) small claims courts, and (4) class actions. The Institute and its staff also gave consideration to state and local licensing, to other criminal and administrative sanctions, and to consumer education, and studies relating to these topics will be among those published. But the four topics considered in the Report itself are believed to be the most central to the problems of consumer justice.

The Report recognizes that many more consumer grievances are handled informally by business-sponsored mechanisms than are dealt with by adversary procedures. It joins in two recommendations of the National Business Council for Business Affairs for the improvement of internal handling of complaints and for exploration of the money-back policy, and proposes that the Better Business Bureaus play an active role in improving internal grievance procedures. With respect to dispute resolution by external business-sponsored mechanisms such as the Better Business Bureaus, we recommend an independent evaluation as a first step toward improvement.

When disputes are not avoided or resolved informally, arbitration is often a possible alternative. The Report takes note of the strengths and weaknesses of arbitration, recommends that it be considered as one means of settling consumer grievances, and urges all states to

provide by statute for binding agreements to arbitrate. It also proposes that consideration be given to making arbitration available in connection with new consumer legislation, calls for evaluations of existing arbitration programs, and suggests that consumers might be required to exhaust reasonable internal grievance procedures before proceeding to arbitration.

The Institute devoted much of its effort to study of existing small claims courts and to methods of making these courts more readily available to potential consumer plaintiffs. On the basis of its studies, it makes a number of specific recommendations for the improvement of such courts, including the allocation of federal funds to the states. We regard these recommendations as the most significant part of the Report.

As to class actions, the Report begins with the fact that not enough is now known about costs and benefits to permit reliable evaluation. It recommends continued experimentation for a period of five years, states the main goal of such actions, and suggests a number of procedural improvements. Perhaps most important, procedurally, is a preliminary decision by the court, after hearing, whether the maintenance of the action as a class action would be in the public interest, taking into account all relevant factors including the probability of success on the merits. The Report also recommends that consumers be permitted to aggregate like claims in determining the jurisdictional amount in controversy, and that neither punitive nor minimum damages be awarded automatically.

The Institute extends its special thanks to the President's special assistant for consumer affairs, Virginia H. Knauer, for her assistance in its organization, to Professor Thomas E. Kauper of the Michigan Law School, its original executive director, and to Professor James J. White of the same school, who stepped into the breach when Professor Kauper resigned to take on the duties of Assistant Attorney General. We also wish to thank David S. Gould, Esq., Susan Alexander, Esq., and the law students who worked under them. Our work was made possible by a grant from the Office of Economic Opportunity and was facilitated by the cooperation of the Administrative Conference of the United States.

It is our hope that this Report and the supplementary studies will contribute to the ongoing work of countless individuals and groups to improve the quality of justice available to aggrieved consumers.

Robert Braucher
Chairman

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INTRODUCTION

The National Institute for Consumer Justice grew out of the President's consumer address made on February 24, 1971, which called upon "interested private citizens to undertake a thorough study of the adequacy of existing procedures for the resolution of disputes arising out of consumer transactions." The Institute commenced operations in the summer of 1971 and concluded its work in March of 1973. Organized as a non-profit corporation in the District of Columbia governed by a 16-member Board of Directors, its sole source of funds was a $150,000 research grant from the Office of Economic Opportunity (OEO); its permanent staff never exceeded three persons at any one time.

Considerations of time and resources made it impossible for the Institute to deal with all the problems that might be covered by the umbrella "consumer justice." From the outset we limited our consideration to the problems that faced consumers who suffered economic loss by paying for defective or misrepresented goods or services. Our focus was on the consumer who buys the vacuum cleaner that does not work, who pays for a faulty car repair job, or who suffers a similar economic loss. Thus, we excluded from our consideration the distinctive problems of personal injury, landlord and tenant law, automobile accident insurance, and public utilities. We do not mean to suggest that those questions and others like them do not merit study; we concluded that each was sufficiently different from our main focus that it could be logically excluded.

After we had decided to limit our consideration essentially to the problems of the consumer who receives defective goods or services and so suffers economic loss, we were forced by limitations of time and money to make a second choice, the choice among the various types of prevention and redress that could be studied. These run

all the way from a money-back policy through individual lawsuits and consumer class actions to criminal sanctions and boycotts. We selected what we consider to be the four most important topics relating to dispute resolution: Business Sponsored Mechanisms, Arbitration, Class Actions and Small Claims Courts.

We did not consider consumer education, nor did we examine the wide variety of substantive laws that might be enacted to aid the consumer. Although we recognize the low-income consumer is peculiarly vulnerable to deceptive and dishonest sellers, we did not address ourselves to the special problems of the poor. Except insofar as we focused upon redress and prevention devices that might not involve a lawyer, we did not consider cost of legal services and the problems associated with current and proposed methods of providing them. Thus, we studied neither the existing OEO legal services nor the budding group legal service arrangements, each of which may have a significant impact upon the problems of the consumer.

In addition to this report, the Institute staff and consultants have prepared a variety of studies listed below. Some of them deal with the four topics treated in this report; others deal with topics that the Board was unable to consider at length, such as criminal sanctions and the role of the federal, state and local administrative agencies. Several staff studies deal with rather narrow topics, such as attorneys' fees, the right to jury trial, and civil penalties, damages and fines. Though they served as resource material, none of the staff studies has been adopted by the Board as the position of the Institute; each constitutes only the report of the individual staff member or consultant. We are publishing these studies separately as a supplement to the Board Report, and will provide copies to various libraries and to the members of Congress.

The specific recommendations in this report constitute the action of the Board of Directors of the Institute. Each of the recommendations and the accompanying discussion published in this document commanded the support of a majority of the Board. Separate statements of some of the members of the Board with respect to particular recommendations are attached.

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BUSINESS SPONSORED MECHANISMS FOR THE REDRESS OF CONSUMER GRIEVANCES

The staff report on business sponsored mechanisms for resolving consumer disputes adequately reveals the strengths and weaknesses of such mechanisms for resolving consumer disputes. When such procedures work correctly, they are the fastest, most efficient, and most satisfactory method of resolving consumer grievances that can be resolved by refund, repair or replacement. They give the consumer what he wants and he does not have to spend his time or his money in presenting his case to a third party, hiring a lawyer, or going to court. Yet there are inherent and serious weaknesses in the current business sponsored mechanisms. It is fanciful to believe that an internal procedure will change the ways of one bent on fraud. Moreover, it seems unlikely that either an internal procedure or an external business sponsored one such as the Better Business Bureau will force a retailer to swallow a considerable cost in the name of goodwill when he believes he is in the right. If a car dealer believes that a car in question works and that the consumer is simply being unreasonable, neither an internal procedure nor the Better Business Bureau is likely to make him change his mind. If the Rosenthal study[1] is correct in concluding that the Better Business Bureaus include only a small percentage of the merchants in most areas, that the Bureaus are beholden to those merchants and have little or no influence over the merchants who are not members, then there is little hope that the Bureaus will become zealous advocates of the consumer interest when that interest truly conflicts with the business interest. Thus,

[1]In 1971 Congressman Benjamin S. Rosenthal of New York conducted a study of Better Business Bureaus. The study is entitled "Report on the Better Business Bureaus."

we believe that business sponsored activities should be fostered and continued but conclude that they cannot be relied upon as a method of consumer redress in fraud cases or even in non-fraud cases where the businessman believes he is correct and a large amount is at stake. The NICJ recommends as follows:

1. THAT BUSINESSES ADOPT THE FOLLOWING TWO RECOMMENDATIONS MADE BY THE NATIONAL BUSINESS COUNCIL FOR CONSUMER AFFAIRS:[2]

   Recommendation 1

   THE HANDLING OF CONSUMER COMPLAINTS SHOULD BE SWIFT, PERSONALIZED, COURTEOUS, AND AS EFFECTIVELY MANAGED AS ANY OTHER FUNCTION OF PRIME IMPORTANCE TO THE COMPANY, INCLUDING INCREASED PERSONNEL TRAINING IN THE HANDLING OF CONSUMER COMMUNICATIONS, COMPLAINT FOLLOW-UP, AND APPROPRIATE INVOLVEMENT BY SENIOR MANAGEMENT.

   Recommendation 2

   THE MONEY-BACK POLICY SHOULD BE FULLY EXPLORED BY COMPANIES NOT NOW OFFERING IT AND SHOULD BE ADOPTED WHEREVER FEASIBLE AS A MEANS TO DIRECTLY RESOLVE DISPUTES WITH CONSUMERS.

We realize that many businesses have established internal grievance procedures that are swift and effective. We hope that other businesses will see it in their interest to do the same, and we believe that the question of inducements to businesses to establish effective internal procedures should be further explored. For example, the Warranty Bill passed by the Senate at the last session[3] contained a provision that would have rendered the defendant liable for double damages if he had an inadequate grievance procedure. We do not specifically endorse or reject that proposal but suggest that Congress and the state legislatures should consider such inducements to encourage the establishment of effective procedures.

[2]The adoption by the NICJ of these two recommendations does not mean the NICJ rejects the NBCC's other recommendations. The NICJ chose to highlight these two NBCC recommendations because similar conclusions were reached independently by the NICJ Board of Directors after much discussion on the issues.

[3]Warranty Bill, S.986 92d Congress first session 1971, died with the 92d Congress.

2. THAT THE BETTER BUSINESS BUREAUS REQUIRE THEIR MEMBERS TO ESTABLISH EFFECTIVE INTERNAL GRIEVANCE PROCEDURES.

One area in which the Better Business Bureaus could be active is encouraging the establishment of effective internal procedures. The Better Business Bureau requirements would have the further virtue of flexibility. That is, the small individually owned operation would not necessarily have to apply the same kind of internal grievance procedure as a national automobile manufacturer. The National Council could establish some flexible guidelines to outline the kind of procedure appropriate for different kinds of businesses.

3. THAT AN INDEPENDENT EVALUATION BE MADE OF BOTH INTERNAL AND EXTERNAL BUSINESS SPONSORED MECHANISMS FOR RESOLVING CONSUMER DISPUTES.

We find that we are hampered in arriving at conclusions and recommendations in this area by the absence of sufficient data. For reasons described in the Staff Report the statistics published by the Better Business Bureaus and by the various manufacturers and retailers are not as reliable as they might be. For example, one study assumed that a complaint had been resolved successfully any time the consumer failed to call back and voice it a second time.

To make concrete recommendations about procedures that should be adopted one should know exactly how effective operations work. It is necessary to examine them structurally, to consider the kinds of cases that are brought to them, and to determine whether the lessons thus learned can be transferred elsewhere. It may be that consumer redress with respect to big-ticket items is inherently different from that with respect to small sales. A liberal money-back guarantee for example, which benefits both the consumer and the seller in terms of money and time saved and certainly in terms of businessmen-consumer relations, may not work effectively for big-ticket items. It is much easier to imagine a seller taking back a sweater one week after sale than a car. Or again, it may be that there are significant differences between the national manufacturers and retailers on the one hand and local retailers on the other.

At present we lack data sufficient even to speculate on these mat-

ters. We suspect that there is a wide difference of opinion between the businessman on the one hand and the consumer advocates on the other about the actual efficacy of the procedures and about the merit of the various consumer complaints.

ARBITRATION

INTRODUCTION

Arbitration—The referral of a dispute to one or more impartial arbitrators for a final and binding decision.[1]

The ideal situation for both consumers and businessmen would be the fair and efficient settlement of all disputes by some informal dispute settlement mechanism. However, since there are disputes which, for one reason or another, will not be resolved through negotiation or mediation, arbitration must often be considered as a possible alternative method.

Arbitration is probably best known for its use in labor disputes. However, it has also been employed with varying degrees of success to settle disputes between businesses, to unclog court dockets by providing a forum outside of the traditional courtroom, to provide an alternate decision-making process within the traditional courtroom process, to settle disputes arising under a specific statute, and to settle disputes arising between consumers and businessmen in a specific industry.

Arbitration is receiving increasing attention as a possible method of settling consumer grievances. There are many instances where an arbitration process will remedy the absence of any other mechanism; it will provide a method of dispute resolution where the parties would otherwise not have sought any litigated solution. For example, a shopping-center-based arbitrator would "fill a void" because many disputes (based upon imperfect merchandise sold in the shopping center)

[1] *See* K. Seide (comp.) DICTIONARY OF ARBITRATION AND ITS TERMS 26 (1970).

that remain after appeal to the business internal grievance system would otherwise go unresolved.

Generally, however, the arbitration process is instituted in lieu of a more traditional courtroom process presided over by a judge. And much of its appeal is attributable to its advantages over the traditional courtroom process.

Arbitrated cases can often be scheduled and tried much more quickly than regular court cases. For a variety of reasons, the overall cost of arbitrating cases is generally lower than the cost of litigating in court. Taking cases out of the courtroom helps keep unwarranted publicity from damaging "innocent" businessmen. The privacy and informality of arbitration may help the consumer by placing a more reticent or frightened litigant at ease. The consumer may also be the beneficiary of a predilection of many arbitrators to render a decision which is not hampered by technicalities of the law. Moreover, since arbitrators do not have to adhere strictly to the rules of evidence, they can avoid the "intimidating" aura of a traditional courtroom process. They can also inject themselves as inquisitors into a case and help a *pro se* litigant develop his story. Such powers help speed up the trial as well as make it more understandable to a layman. Arbitration is inherently convenient for all parties since the arbitration can be conducted anywhere and anytime. On the scene investigations are often possible.

In sum, then, the main advantage of arbitration is its flexibility. It is both literally and figuratively less bound by the confines of a courtroom than "regular" court cases. Cases can be processed quickly, efficiently, with finality and with an eye towards doing justice. On balance, arbitration can be a valuable tool for settling disputes efficiently and fairly. It is not, however, an unmitigated good. There are some limitations and qualifications to the generally beneficial impact of an arbitration process.

Arbitration can take place almost anywhere, but it is often necessary to have a centralized (and often inconvenient) place to file papers, to schedule trial times and generally to perform procedures necessary to initiate the arbitration process. Taking litigation out of the "intimidating" atmosphere of the traditional courtroom hearing involves the sacrifice of the legitimacy and dignity that a traditional courtroom process provides. The relative privacy and low profile of arbitrated cases will prove to be a handicap where, for a number of reasons, a party or even society would benefit from the publicity attendant

to a more visible process. Even the speed of scheduling and hearing arbitrated cases may be somewhat curtailed if arbitration becomes widespread. It must also be remembered that arbitration does use valuable resources (e.g., *pro bono* time given by attorney-arbitrators). The growing popularity of arbitration may eventually deplete its resources, both professional and volunteer.

The flexibility of arbitration has drawbacks too. The rules of evidence, though not as crucial where there is no jury and the arbitrator is legally trained, were devised to ensure that decisions were based on "valid" evidence. Where large amounts of money and complicated technical, legal, or factual issues are involved, perhaps a trial should be painstakingly slow and meticulous. Observers have also complained about what they consider to be the arbitrator's tendency "to split the difference" or favor a "weak" party over a stronger one without due regard to the merits of the case. In short, the flexibility of the arbitration procedures and the finality of the decision can lead to abuse.

The limitations of arbitration discussed above are by no means insuperable. They merely dictate caution in approaching arbitration programs. However, there are three obstacles that an arbitration process, particularly one in the consumer field, must overcome in order to be successful.

The most basic obstacle is getting the parties to a dispute to agree to submit it to arbitration. One way to overcome this is to provide in the sales contract for compulsory arbitration. However, one should be most circumspect about denying either party the choice of submitting his dispute to the traditional courtroom process.

It is still an open question whether consumers will voluntarily submit disputes to arbitration. So far the choice has not been genuinely available to them. There is evidence, however, that businessmen have not welcomed a voluntary arbitration process. The Council of Better Business Bureaus and the American Arbitration Association have been notably unsuccessful in getting businessmen to agree to submit their disputes to neighborhood or shopping-center arbitration processes. If there were a feasible courtroom alternative for the consumer—such as a viable small claims court system—businessmen might be more amenable to an arbitration process. Many businessmen now feel that since they honor all reasonable complaints—and even some unreasonable ones—any unsettled dispute is *ipso facto* not a *bona fide* one, and therefore, any arbitration process would be superfluous at best

and unfair to the businessman at worst. Part of the problem may also lie in the fact that consumer arbitration is basically new and untested. If that is true, further experience may bring cascading popularity.

The second major obstacle consumer arbitration must overcome is cost. Although arbitration is less costly than court-litigated cases, it is never inexpensive. Even in uninsured motorist cases the insured must usually contribute about fifty dollars towards the arbitration. A fee at this level would effectively rule out very small cases and may discourage consumer-initiated arbitration in larger cases too.

The cost problem does not loom as large when the arbitration is taking place in a courtroom, as in the New York City small claims courts, or as part and parcel of a court system as in the Philadelphia arbitration system. The government, in effect, subsidizes the arbitration in those instances to the extent that the arbitration process utilizes court personnel or facilities. The major problem arises in out-of-court arbitration. Even if the arbitrators serve without pay, someone must bear the cost of the logistics, personnel, facilities, etc. that are a *sine qua non* of any litigation process. It is unlikely that businessmen will willingly undertake the entire financing of a truly independent arbitration process.

Financial support for arbitration projects could come from the parties involved, or from businessmen, foundations, consumer groups, or governmental units. So the problem is not insuperable, but it is a bothersome obstacle to out-of-court consumer arbitration. If consumers have to pay a high filing fee to use the arbitration process, they will bring only large cases, cases that traditionally go into the courtroom process.

A third obstacle that confronts consumer arbitration is attributable to the basically *ad hoc* nature of arbitration results. Arbitration decisions form no precedent and to some extent are free of the fetters of *stare decisis*. This lack of precedential value would not be a great problem in the overwhelming majority of consumer cases in which the main goal is to settle a one-to-one dispute rather than to create, reinforce, alter or completely overturn legal precedent. However there are cases in which businessmen want precedent established so they can know how to order their actions in the future. Consumers, on the other hand, may want precedent set in cases involving an allegedly illegal or prohibited activity that affects large numbers of consumers.

The "lack of precedent" obstacle seems the easiest to overcome

since, if arbitration is truly voluntary, either side can opt to use a traditional court process. Yet, cases will arise in which businessmen and consumers have voluntarily agreed in advance to submit all of their disputes to arbitration; in such cases each side will have effectively relinquished its unilateral option to use the court before he knows the precise nature of the dispute.

The NICJ recommends:

4. THAT ARBITRATION BE CONSIDERED AS ONE MEANS OF SETTLING CONSUMER GRIEVANCES THAT CANNOT BE RESOLVED BY NEGOTIATION OR MEDIATION.

Arbitration is a promising method of dealing efficiently and relatively cheaply with large numbers of consumer complaints. There are, however, some limitations to consumer arbitration and some obstacles impeding its widespread acceptance. Arbitration is an inherently flexible process and every effort should be made to model the arbitration process to the exigencies of the consumer problem at hand.

5. THAT ALL STATES ADOPT A UNIFORM ARBITRATION ACT.

At common law an agreement to arbitrate was generally not enforceable. That rule has been changed in most states, but in some states only agreements made after the dispute has arisen are enforceable. In two states the common law rule still prevails. Where necessary state laws should be amended to give binding effect to written agreements to arbitrate. Such agreements should be binding, both as to disputes in existence at the time of the agreement and as to those that arise after the agreement.

6. THAT IN ADOPTING NEW CONSUMER LEGISLATION, CONSIDERATION BE GIVEN TO MAKING ARBITRATION AVAILABLE AS A WAY OF SETTLING DISPUTES THAT ARISE UNDER IT.

Recommendation 5 will make arbitration possible throughout the country. This recommendation will make arbitration feasible by mak-

ing it available. Making arbitration "available" would include setting up the machinery for an arbitration process providing for, *inter alia*, arbitrators, a convenient method for initiating arbitration, a fair set of procedures,[2] a location for the arbitration, incentives to arbitrate, and perhaps most importantly, a method for funding the arbitration process so that it is not prohibitively expensive for the litigants.

7. THAT THE SAME ORGANIZATION THAT EVALUATES THE BUSINESS-SPONSORED GRIEVANCE PROGRAMS EVALUATE EXISTING VOLUNTARY CONSUMER ARBITRATION PROGRAMS.

Consumer arbitration is now largely an unknown quantity. It appears to have great potential for becoming a satisfactory dispute-solving tool for both consumers and businessmen. But there is a need for hard facts to demonstrate what type of arbitration works well, under which conditions and at what cost. For instance, although it is believed that certain voluntary arbitration programs are effective, there are no data known to us that show how the outcomes in arbitrated cases might differ from those in small claims court. An independent organization that collected and evaluated data on consumer arbitration programs could greatly help in charting its futute course.

8. THAT IN SOME CIRCUMSTANCES PERSONS BE PERMITTED TO RESORT TO ARBITRATION ONLY AFTER THEY HAVE EXHAUSTED REASONABLE INTERNAL GRIEVANCE PROCEDURES.

Just as there is need for stimuli to cause plaintiffs to seek arbitration rather than litigation, so there is need for stimuli to cause would-be plaintiffs to use effective internal grievance procedures before they go to arbitration. When a defendant has carefully established and clearly spelled out an internal grievance procedure, and the plaintiff has ignored that procedure, the defendant should be permitted to stay the arbitration proceedings until the plaintiff has used the private mechanism.

Of course, in establishing such a condition precedent to arbitration,

[2]The statute might just allow some organization like the American Arbitration Association to set the ground rules for the actual arbitration process itself.

one must use care not to place too many impediments in the consumer-plaintiff's path. The would-be defendant should not be permitted to establish a lengthy, discouraging, and unrewarding procedure in order to wear down his potential adversary. Thus, such a condition precedent should be applied only in those circumstances in which the would-be defendant has established that he has a reasonable and effective procedure.

SMALL CLAIMS COURTS

INTRODUCTION

Beginning in 1913 the small claims court movement spread rapidly across the United States. Its goal was to provide speedy and inexpensive justice for the litigants who could not afford a lawyer. By the middle of the 20th century the small claims court movement had disappeared and the courts themselves had become forgotten stepchildren. To the extent the small claims courts have attracted attention in the past 25 years, it has been the attention of critics who have charged that they have become collection agencies for professional creditors.

Despite this tarnished image, the small claims courts have considerable potential for the redress of injuries done to individual consumers and as a stimulus to potential defendants to improve other procedures of redress. A businessman who knows that a disgruntled customer is likely to use the small claims court may be moved to establish a better grievance procedure or to agree to a mandatory arbitration procedure.

It is probably useful to divide consideration of the small claims problem in two. First, one should consider the quality of justice the courts dispense. How can their procedures be made more fair, their decisions more just, and their operations more efficient? Second, and perhaps more important, one must consider how to make these courts more readily available to potential plaintiffs. Among one hundred persons with legitimate complaints that could be adequately resolved by the small claims courts, how many find their way to these courts? How can we modify the court's hours, places of sitting or procedures to encourage those who do not use the courts to use them?

The empirical studies sponsored by the NICJ focused almost exclusively on the first question, how do the courts work? The NICJ sponsored or co-sponsored studies of small claims courts in Los Angeles, Detroit, Ann Arbor, Boston and Philadelphia. In addition, NICJ staff members observed the operation of small claims courts in New York City, particularly in Harlem, and we have been able to draw upon several other empirical studies of small claims courts. Although the courts that we studied differed from one another—some were better than others—the predominant finding of our studies is that the courts generally do a good job for the plaintiffs who manage to find their way into them. Both our observers and the plaintiffs themselves tend to regard the procedure as fair and the outcome as proper. Although some small claims courts are indeed used as collection mills for professional creditors, it appears that that same speedy and effective justice is available for consumer plaintiffs as for business plaintiffs, and that in reality the small claims courts should properly be identified not as collection mills, but as plaintiffs' courts. Some of our studies show that consumer plaintiffs had nearly as high a success rate in small claims courts as corporate plaintiffs. For example, in the Los Angeles study approximately 86% of the consumer-plaintiffs prevailed in cases that proceeded to hearing (either contested or default). If one includes the cases that were settled or dismissed, plaintiffs received a judgment or a settlement in 81% of the cases studied. In Philadelphia almost two thirds of the consumer-plaintiff cases resulted in a judgment for plaintiff or a settlement. If one excludes cases voluntarily dismissed by the plaintiff, the figure increases to just short of 90%.

Although the data acquired in the above studies will surely be useful, we suspect that the more serious problem lies in the question, how does one get the proper plaintiffs to come to these courts? Our studies showed that there are various barriers to the potential plaintiff, barriers that to many must seem formidable indeed. Many courts are located only in the downtown section of large cities. They are often open only during the day on weekdays, when many would-be plaintiffs must be at work. In some courts there are insufficient personnel to assist the potential plaintiff in making out his complaint, and the job of finding the right form, the right clerk's window and the correct courtroom is almost always a difficult one. While we have little direct evidence that these factors kept many potential plaintiffs away from the court (for we did not interview or collect data from those who

had complaints but who failed to use the courts), increased use of some courts when some of these factors have been changed supports the argument that they are significant impediments.

The recommendations that follow endeavor to deal with both problems: (1) How does one make the court produce better justice, and (2) How does one make the court more accessible?

9. THAT A SMALL CLAIMS COURT SHOULD BE AVAILABLE AND ACCESSIBLE TO EVERY PERSON IN ORDER TO PROVIDE SIMPLE, SPEEDY, INEXPENSIVE AND UNDERSTANDABLE JUSTICE.

A small claims court should render the prosecution of claims involving relatively small sums economically feasible, and should provide for their disposal not longer than 30 days from the date of filing. Any court that is to render inexpensive and speedy justice must have simple procedures. Complexity inevitably leads to delay and to increased costs.

It is seldom feasible to hire a lawyer to handle a claim of less than $500 in a regular court; if the claim is a complex one it may be economically unfeasible to hire a lawyer on a claim many times that amount. Small claims courts should be available for any claim no matter how small. Moreover, successful prosecution should be economically advantageous even for very small claims. That means that the fees should be low; there should be few peripheral costs, such as the cost of taking time off from work; and the costs for receiving aid in prosecuting a claim and realizing on the judgment should be low. We recognize that establishing a procedure that meets these tests will require the state to pay a large share of the costs.

A small claims court should be open at hours when the consumer plaintiff is not at work and, to the extent possible, it should be located so that he need not travel long distances to use it. Inevitably, the hours that a court is open and its geographical location will depend upon a number of factors; there is no formula that will fit all circumstances. A plan that would make sense for a big city might not make sense for a rural county, yet we believe that hours and location are significant factors in determining court use.

The small claims courts were originally established to help the poor. However, we see no reason why the court cannot operate as well for the middle class individual, for the small businessman or even

for the corporation. We believe that all can benefit from speedy justice.

Although we would not exclude the corporation from the small claims court, we recognize the problem that may arise when professional creditors, such as utilities and small loan companies, make heavy use of the courts. Any small claims court that is open to such use may become overcrowded and will need additional resources to handle the case load. Moreover, the court may become a place where the consumer is, or regards himself as, unwelcome. To meet this problem some courts may wish to limit the number of cases that any one plaintiff can file within a specific period of time or to limit professional creditors' use of the court to certain hours or days. At a minimum, clerks, judges and other court personnel who deal with substantial professional-creditor caseloads must be vigilant lest they become unreceptive to the legitimate problems of the consumer who is unfamiliar with the court procedures.

10. THAT THE SMALL CLAIMS COURT SHOULD BE A PART OF THE REGULAR COURT SYSTEM.

In some circumstances an ideal small claims court might be a neighborhood court in the sense that it could be located within a community, employ people from the community and be identified by all as a part of the community. We believe, however, that the court needs the legitimacy and authority that comes from being a part of the regular court system. Moreover, the court must have a permanent location so that potential plaintiffs and defendants know where to go.

11. THAT THE COURT SHOULD NOT BE ONLY A CONSUMERS' COURT, BUT SHOULD HAVE THE SAME SUBJECT MATTER AND PERSONAL JURISDICTION AS A REGULAR CIVIL COURT IN THE STATE IN WHICH IT IS LOCATED.

A model small claims court should have subject matter jurisdiction over tort, contract, landlord and tenant cases, and perhaps over others as well. Establishing a separate consumer court would create grave jurisdictional problems and would surely lead to confusion on the part of potential plaintiffs and defendants about the proper court

in which to sue and appear. A separate sitting for consumer cases, where the volume of cases is sufficient, is not inconsistent with this recommendation.

12. THAT IF THERE IS MORE THAN ONE SMALL CLAIMS COURT WITHIN THE JUDICIAL DISTRICT IN WHICH THERE IS JURISDICTION AND VENUE UNDER THE NORMAL COURT RULES, AN INDIVIDUAL PLAINTIFF SHOULD BE PERMITTED TO BRING SUIT IN THE SMALL CLAIMS COURT OF HIS CHOICE. THAT IN SIMILAR CIRCUMSTANCES A CORPORATE OR BUSINESS PLAINTIFF SHOULD HAVE TO SUE IN THE SMALL CLAIMS COURT DISTRICT WHERE THE DEFENDANT RESIDES.

If there are several small claims courts or small claims court districts within a single judicial district, there may be a double-venue problem. For example, where the inner-city and the outlying part of the city lie within one judicial district, it is possible that there will be several small claims neighbo hood courts within that single district. We believe that an individual plaintiff in such circumstances should have the option to choose where he sues, but that a business-plaintiff should be required to choose the small claims district in which the defendant resides. Implicit in this recommendation is the assumption that it may be a considerably greater inconvenience for an individual defendant to travel some distance to defend than it will be for a business-defendant.

The court should have discretion to transfer any case to another court for proper cause. In addition, the court should have the power to transfer a case to the regular civil court if it believes that the case is too complicated for the normal small claims procedure, involves a novel question of law, or for any other good reason.

13. THAT THE SMALL CLAIMS COURTS SHOULD HAVE THE POWER TO ORDER REPAIRS, RESCISSION OR REFORMATION.

If a court is limited to rendering a money judgment, both parties to the suit may be the losers, for repair, replacement or reformation

will often be the easiest and cheapest method of remedying a defect or of correcting a misunderstanding.

14. THAT THE MONETARY CEILING IN THE COURT'S JURISDICTION SHOULD BE HIGH ENOUGH SO THAT MOST CASES WHICH COULD NOT BE ECONOMICALLY CARRIED TO THE REGULAR CIVIL COURT WOULD FIT WITHIN IT.

Because the cost of litigating varies from place to place, we do not place a dollar limitation on the court's jurisdiction. The $100 maximum that still prevails in some courts is plainly too low. In current circumstances, $1,000 may be more appropriate.

15. THAT A SMALL CLAIMS COURT SHOULD HAVE EVENING AND SATURDAY HOURS.

Most small claims courts are open only during the day on regular court days. Weekday courts are convenient for lawyers and collection agencies, but they are not convenient for those who must make their living at work elsewhere. Night sessions in New York City have had considerable success, and other courts that have had little business might increase their business considerably by holding well-publicized evening or Saturday sessions. The holding of such sessions can considerably reduce the cost to the individual plaintiff who may have to miss work or hire a babysitter to attend the weekday court.

16. THAT NEIGHBORHOOD SMALL CLAIMS COURTS SHOULD BE ESTABLISHED, PARTICULARLY IN URBAN AREAS.

The geographical location of many courts is a substantial barrier to many potential plaintiffs. In the cities considerations of safety and strangeness, as well as distance, are involved. For example, the court in Detroit sits only in the downtown City-County Building. Our observers of that court found it to be a fair and comparatively efficient one, but only a miniscule number of consumer-plaintiffs made their way to that court. A court located in a local community would undoubtedly enjoy greater use.

The rural problem is somewhat different. Here distance is the major

problem and traveling courts may be appropriate.

17. THAT SIMPLE FORM PLEADINGS SHOULD BE PROVIDED. THAT THE COMPLAINT SHOULD BE THE ONLY PLEADING REQUIRED AND THAT SERVICE BE PROVIDED BY THE CLERK THROUGH CERTIFIED OR REGISTERED MAIL.

Many courts now have form pleadings that help the plaintiff initiate his claim. We believe these should be more widely used since well-drawn pleadings can minimize the assistance the typical plaintiff will need. To keep the procedure simple, neither party should be required to make formal written motions, demands, or responses. The defendant should be permitted to assert a counterclaim in writing.

Service by certified or registered mail is likely to be at least as efficient as the personal service methods currently in use in our large cities.

18. THAT COURT PERSONNEL SHOULD ASSIST THE PARTIES IN DRAFTING COMPLAINTS AND PREPARING AND PRESENTING CASES.

Many individual plaintiffs will have difficulty filling out even simplified complaint forms. Most will not know how the form is to be served, how it must be signed, and what fees must be paid. Moreover, the litigant may be ignorant of the kinds of evidence he should collect, of his right to subpoena witnesses, and of the documents that he should bring to court.

We believe that the court should make personnel available whose only or primary function is to assist litigants. These persons, who might be specially trained non-professionals, could assist in drafting the complaint, could give advice about the kinds of evidence that should be adduced, could escort the litigants to the courtroom and introduce them to the judge, and even, as in the Harlem court, assist litigants in presenting their evidence.

Our studies have shown a variety of difficulties with the assistance currently available at small claims courts. Clerks are seldom assigned exclusively to the small claims court, and even less frequently are they made to understand that it is their job to work for and assist

the litigants. More commonly this is an added job, and it is often slighted.

We believe that the small claims court should emphasize to its employees their obligations to assist the litigants and should instruct them on court procedures and the legal questions that most commonly arise. To this end, the court should prepare a detailed manual for its employees. It should also prepare and distribute a simplified pamphlet for use by litigants themselves.

19. THAT FEES SHOULD BE LOW AND THAT THE COURT SHOULD HAVE THE DISCRETION TO WAIVE THEM.

Some courts now have entry fees that rise as the amount claimed by the plaintiff goes up. Particularly if the small claims court is open to claims approaching $1,000, it is appropriate to consider the institution of such sliding scale fees. In no case should indigents have to pay fees.

20. THAT SMALL CLAIMS COURT JUDGES SHOULD COME FROM THE REGULAR CIVIL COURTS AND SERVE ON A ROTATING BASIS EXCEPT FOR ONE FULL-TIME ADMINISTRATIVE JUDGE WHO WOULD PRESIDE OVER ALL THE SMALL CLAIMS COURTS WITHIN THE APPROPRIATE DISTRICT, COUNTY OR SYSTEM.

There are several reasons why small claims courts need a status at least equal to that of the regular civil court. It is important to insure that the litigants accept the court's judgment and find it an appropriate arbiter. It is also important to give the court status in order to attract able persons to serve as judges and clerks. Some small claims courts work well and others do not, largely because of the personalities and the inclinations of the judges that run them. We suggest that judges rotate only because we believe that normally such a rotation would maintain the status of the court better than the permanent assignment of an individual judge; but that should not be an invariable rule.

The appointment of an administrative judge to oversee the small claims court within a district or perhaps a state-wide system is a recognition of the court's importance. This judge should be concerned with the day-to-day management of the courts and with planning to

make the court an up-to-date and effective tool of justice.

21. THAT SMALL CLAIMS COURTS WITH HEAVY CASE LOADS COULD ALLEVIATE THOSE LOADS BY ESTABLISHING AN ARBITRATION ALTERNATIVE MANNED BY LOCAL LAWYERS.

We propose that in crowded courts the potential litigants be given the option of having their cases heard by the judge or by an arbitrator. If either party objects to arbitration, the court should hear the case. The small claims court in New York City has effectively handled its heavy caseload by establishing such a courthouse arbitration system. About three-fourths of the cases are disposed of by local lawyers who arbitrate the cases in the hearing rooms of the courthouse on the date they are set for trial. We see no reason why the New York experience cannot be transferred elsewhere.

22. THAT SMALL CLAIMS COURTS SHOULD CONSIDER THE POSSIBILITY OF INTRODUCING A MEDIATION STEP IN THE PROCEDURE.

Many cases in small claims courts and regular courts are settled in court on the day of trial. Since neither party will be represented by a lawyer in the small claims context, it may be more desirable there than elsewhere to establish a formal mediation procedure to be held at the courthouse on the day of trial. Of course, the role of mediator is often played by the judge himself, but we believe it is better played by someone else in the small claims context and fear that judicial intervention may unfairly coerce the litigants or may cause the more fearful or less articlate party to agree to an unwise settlement.

23. THAT THE COURT SHOULD NOT BE REQUIRED TO ADHERE TO THE RULES OF EVIDENCE IN SMALL CLAIMS CASES, EXCEPT FOR RULES RELATING TO PRIVILEGED INFORMATION.

A court that tried to make all small claims litigants adhere to the rules of evidence would have no time to devote to the substance of the cases before it. The policies underlying the rules of evidence

should guide the court in its decision and in the weight it gives to the various evidence presented but, except for the rules with respect to privileged information, we believe the courts should not be required to adhere to the rules of evidence.

24. THAT THE COURT SHOULD AWARD A DEFAULT JUDGMENT ONLY AFTER INQUIRY INTO THE EFFECTIVENESS OF SERVICE AND THE UNDERLYING FACTS.

Where service is by the clerk through mail, a certified mail receipt or other appropriate written evidence of mailing from the clerk is a sufficient showing. Where the plaintiff's case depends upon personal service, there should be an inquiry into the mode of service and an attempt to locate the defendant to determine whether the defendant has in fact been effectively served.

Only after a *prima facie* showing of service and of the merits of the claim should the court award a default judgment. The plaintiff's recitation of his claim will sometimes disclose that it has no merit or that the amount of his damages is less than he has claimed.

25. THAT THE DEFENDANT SHOULD HAVE A RIGHT TO APPEAL ANY SMALL CLAIMS DECISION AND TO PROCURE A TRIAL DE NOVO UPON THE PAYMENT OF APPROPRIATE COSTS.

By suing in small claims court a plaintiff may be deemed to have waived his right to a jury trial, right to a lawyer or right to other procedures that might be available to him elsewhere. Unless he has waived this right after suit was commenced, the defendant should be given the right to a *de novo* trial. Such a right need not be accorded where the defendant has had the opportunity to remove the case to a court in which his constitutionally-protected procedural rights are available. Experience discloses that few cases will be retried even if a right to *de novo* hearing is available.

26. THAT EFFECTIVE AND INEXPENSIVE COLLECTION ASSISTANCE BE AVAILABLE TO EVERY PARTY WHO OBTAINS A JUDGMENT IN SMALL CLAIMS COURT.

One of the most common causes of dissatisfaction with small claims

courts that our studies revealed was the plaintiff's inability to collect on his judgment once he had obtained it. Our data show that a large number of successful plaintiffs are unable to collect on their judgments because they are ignorant of the procedure, or because they cannot find the defendant. The first barrier to effective collection is the plaintiff's ignorance of the procedure. Court personnel must be available to advise him about the available methods of collection. Ideally, court personnel would actually make out the appropriate papers and so commence the collection process.

When collection is done on a fee or commission basis, the collectors tend to favor their high volume clients (collection agencies) or give priority to those claims that will produce the biggest commission (large claims). To insure that the small claims court plaintiff gets his fair share of the collector's time, the collector should serve on a salary.

27. THAT LAWYERS SHOULD NOT BE ALLOWED TO APPEAR BEFORE SMALL CLAIMS COURTS EXCEPT TO SUE ON THEIR OWN BEHALF.

There are many reasons why lawyers should be kept out of the small claims court. The typical individual plaintiff will not have a lawyer; he comes to small claims court because his claim is not large enough to warrant hiring one. If the other side appears with a lawyer, the individual litigant will be at a considerable disadvantage. The presence of a lawyer in a proceeding may affect it in a variety of obvious and subtle ways. It may cause the judge to take a less active role in the trying of the case. The judge may be more hesitant to cross-examine and slower to draw out the plaintiff. The lawyer will inevitably complicate the procedure by the use of evidentiary objections, by making motions, and perhaps in other ways. By these and other means he may effectively intimidate the individual plaintiff; he will surely put that plaintiff at a disadvantage.

The experience in Los Angeles where lawyers are not permitted in the courtroom discloses that one can have a fair and highly efficient system without lawyers.

By this recommendation we propose to exlude not only lawyers, but also law students. However, a party who needs assistance in presenting his case should receive it from court personnel (see recommendation 18). This may be particularly appropriate when a consumer is confronted by a sophisticated corporate employee or when the

consumer needs an interpreter or other special assistance.

28. THAT COURTS SHOULD KEEP ACCURATE AND THOROUGH RECORDS OF ALL SMALL CLAIMS CASES.

Our small claims courts studies showed that the records in small claims courts in almost every instance were incomplete and inaccurate and that they received low priority from those keeping the records. Only a systematic collection of data can give the answers to some of the questions that one needs to ask. For example, it may be necessary in many states to devise new and more efficient collection procedures if it appears that a large share of all winning plaintiffs are unsuccessful in collecting their judgments. We suspect that many have trouble now, but our data are anecdotal and somewhat haphazard. If the courts would keep records on these matters, we would soon have sufficient data to make a judgment.

The file in each case should include at least the parties' names, addresses, action taken by the plaintiff prior to coming to the small claims court, type of claim, type of claimant, ultimate disposition of the case, and success of collection efforts.

29. THAT THE PRESENCE AND FUNCTIONS OF SMALL CLAIMS COURTS SHOULD BE WIDELY AND SYSTEMATICALLY PUBLICIZED.

A Boston telephone survey found that 75% of the persons contacted did not know of the existence of small claims courts. Our studies showed that most persons who used small claims courts found out about them by word-of-mouth or from a lawyer. Few heard of the courts through any pamphlet or publicity campaign. In a few cases in which the newspapers did publicize the small claims courts there was a significant corresponding rise in number of cases.

These facts suggest that there is need not just for intermittent but for continuing publicity. This can take many forms. Initially there might be instruction in the high schools on availability and use of the small claims court. Radio and TV public service time could be devoted to information on small claims courts. The consumer complaint columns in the newspapers are an effective platform.

30. THAT CONGRESS SHOULD ALLOCATE FUNDS FOR PAYMENT TO THE STATES TO STIMULATE THE ESTABLISHMENT AND MAINTENANCE OF EFFECTIVE SMALL CLAIMS COURTS.

It is possible that a comparatively modest infusion of funds from the federal government, either on a non-recurring or a continuing basis, can stimulate states that now do not have small claims courts or that have only ineffective ones to establish efficient systems. We are not suggesting that the federal government should establish all the standards for small claims courts, but only that it stimulate a movement toward the kind of court that consumer plaintiffs will find fair and effective.

CONSUMER CLASS ACTIONS

INTRODUCTION

The class action is the most controversial of all the proposed judicial remedies for consumer grievances. A class action is a lawsuit in which a representative of a large number of people who have similar claims against the same defendant or defendants can sue on behalf of himself and the others similarly situated. The class action can be helpful to the consumer in a variety of cases in which individual consumers have been injured but often do not bring cases on their own. Such injured individuals may not sue because of the cost of doing so, because they are ignorant of their rights, or for a variety of other reasons. It is likely that even a good arbitration or small claims system will not adequately deal with all such cases.

On the other hand, the class action can be abused. Some argue that making class actions generally available for consumers in the courts will bring forth a host of lawyers purporting to represent injured consumers, but in fact promoting only their own interest or asserting unmeritorious claims. These fears have some foundation in the experience to date. We recognize that the cost of operating a class action system, and particularly the cost of expensive but frivolous suits, may ultimately come to rest on the shoulders of the consumer.

The critical question is whether the benefits to be derived from the class action will exceed the costs, and whether a system can be devised to discourage frivolous cases and otherwise reduce the costs of effective class actions. Because little is known about many aspects of the class action, it is currently difficult to assess the validity of some of the arguments on each side. Some of the procedural and doctrinal issues are now being developed by the courts. To make an intelligent long-range decision about the merits of the consumer

class action one needs to establish much more than that; one needs to know, for example, the extent of consumer abuses currently unremedied, the types of these abuses, the extent to which the class action can provide an efficient remedy for them, the dynamics of settlements, and the nature of defendants' responses to class action liability. These data will be difficult to collect, but we hope that some of them will be available after an experimentation period.

After a period of approximately five years we think it appropriate that Congress or the various state legislatures undertake a thorough analysis of the consumer class action and, on the basis of the experience so gained during the experimentation period, determine whether the use of the class action should be expanded, contracted, or otherwise modified. We suspect that neither the highest hopes of its advocates nor the worst fears of its detractors will be fully realized. In the meantime, we urge courts and legislatures to accept the following recommendations:

31. THAT MORE EXPERIENCE WITH THE CONSUMER CLASS ACTION IS NECESSARY. THAT IN APPROPRIATE CASES IT MAY BE THE MOST FAIR AND EFFECTIVE METHOD OF ADJUSTING CONSUMER GRIEVANCES.

Many people believe that there is a need for the consumer class action. Others have attacked it as being unfair to businessmen, detrimental to the consumer, burdensome to the court systems, and needlessly bountiful to many private attorneys. As indicated above, we believe that experience with the consumer class action is necessary before the actual extent and magnitude of such abuses can be measured and weighed against the beneficial aspects. If experience shows that its abuses outweigh its benefits, the class action should be curtailed.

Our limited endorsement of the class action should not be regarded as a retreat from the position we took with respect to business sponsored redress mechanisms. There we concluded that the best remedy for activities that injure large numbers of consumers is redress by the business itself. We regard the class action as appropriate only in those cases in which the prospective defendant does not itself remedy the wrong.

32. THAT THE MAIN GOAL OF CONSUMER CLASS ACTIONS

SHOULD BE TO PROVIDE REDRESS FOR CONSUMERS' INJURIES CAUSED BY UNLAWFUL ACTIVITIES THAT AFFECT LARGE NUMBERS OF CONSUMERS AND THEREBY TO PROVIDE INCENTIVES TO BUSINESSMEN TO AVOID SIMILAR INJURIES IN THE FUTURE.

The consumer class action is not primarily a device to save court time through the consolidation of a number of lawsuits. Since most class members in consumer class action cases will have too small a stake to bring individual suits, the alternative is not many suits, but no suit.

Ideally each consumer would receive individual redress of his grievances by use of the class action. But because many claims in consumer class actions are small or unprovable, it will not always be possible or feasible to achieve the desired redress by making good the individual damage incurred by each person represented. In such cases other means of redress can be considered.

A properly constructed class action procedure can be an efficient device to provide businessmen with incentive to avoid injuring a large number of consumers in the future.

33. THAT PROCEDURES APPLICABLE TO SUCH ACTIONS BE IMPROVED AND REMEDIES NORMALLY AVAILABLE IN OTHER TYPES OF CLASS ACTIONS BE MADE AVAILABLE.

When there is a need to resort to the class action, consumers should have the range of remedies normally available in class actions. Injunctive, declaratory, or other prospective relief will be the fairest and most efficient method of redress in many cases; in others, some type of retrospective relief will be preferable.

We believe that there should be no general requirement that the plaintiff await administrative or governmental action before beginning the case, nor should the plaintiff in all cases have to serve a demand on the defendant before proceeding. The defendant will have time to offer a settlement plan after the claim has been filed.

34. THAT IN CONSUMER CLASS ACTION CASES THE CONSUMERS SHOULD BE ABLE TO AGGREGATE THEIR CLAIMS FOR THE PURPOSE OF DETERMINING THE

FEDERAL JURISDICTIONAL AMOUNT IN CONTROVERSY.

The Congress should open the federal courts to consumer class actions. The purpose of the $10,000 jurisdictional requirement on the use of federal courts is to exclude cases that do not involve substantial sums. It is not in accord with that purpose to exclude consumer class action cases that involve aggregate sums greater than $10,000. A $100,000 claim made up of 100,000 cases of $1.00 each is no less substantial than a $100,000 claim made up of one $100,000 case.

35. THAT DATA ON THE CONSUMER CLASS ACTION BE COLLECTED.

There are almost no empirical data available on the class action. Statistics on class actions should be kept and published much as they are for antitrust and other types of actions by the Administrative Office of the United States Courts. As a minimum courts should keep docket lists of all class actions filed so that individuals or organizations compiling data will be able to locate class action cases quickly and without a file-by-file search of court records.

To make an intelligent decision about the future of the class action, Congress and the state legislatures will need additional data that must be gathered by more sophisticated means. It will be necessary to know, for example, what kinds of cases are being brought and what kind of monetary reward is needed to bring a plaintiff's lawyer into the market; and it will be necessary to know how, why, and for what dollar amount various kinds of lawsuits are settled. It is particularly important to determine the nature of the subsequent response of the defendants. It is assumed by class action advocates that the prospect of a sizeable judgment against a misbehaving defendant will cause him to improve his behavior. There are, however, other avenues open. The defendant may, for example, choose to go out of business or to write more airtight disclaimers.

36. THAT GROUPS OF JUDGES BE ESTABLISHED TO ISSUE CLASS ACTION GUIDELINES.

The Federal Panel on Multidistrict Legislation was established to

help the federal courts better manage cases involving a similar action arising in many jurisdictions at the same time; that Panel consists of federal court judges. One of the Panel's duties is to issue guidelines that recommend ways to manage various aspects of multidistrict legislation. Since class actions comprise a large number of the cases falling within the mandate of the Panel, the Panel issues some guidelines on some aspects of class actions.

The federal and state governments should establish panels of judges similar to the Multidistrict Panel for class action cases. Among other matters, the panels could provide guidelines on (1) the disposition of unclaimed class action funds, (2) settlement procedures, and (3) the awarding of appropriate attorneys' fees to plaintiffs' attorneys.

The panels would also serve as a clearinghouse for a judicial interchange concerning methods of handling various class action procedures.

37. THAT A PRELIMINARY HEARING BE HELD TO DETERMINE WHETHER AN ACTION SHOULD PROCEED AS A CLASS ACTION, AND WHETHER ITS MAINTENANCE AS A CLASS ACTION WOULD BE IN THE PUBLIC INTEREST.

Rule 23 of the Federal Rules of Civil Procedure contemplates a hearing before a suit can proceed as a class action, but there is some doubt about the scope of that hearing. Experience has shown that the judge's determination about whether the case should proceed as a class action often disposes of the litigation for all practical purposes. In fact we know of no consumer class action case to date that has been fully tried to its conclusion on the merits after a class has been certified. Thus, it is important that the court make an early and well-informed determination on the class issue.

Before determining that a matter should be allowed to proceed as a class action, the court holding a preliminary hearing for that purpose should be required to find specifically that such a determination would be in the public interest. Such a finding would involve consideration of the express purposes of any consumer protection statute involved, in addition to such factors as (A) the probability of success on the merits; (B) the superiority of the class action device over other remedies; (C) the adequacy of representation of the class; (D) the feasibility of giving appropriate notice to the members of

the class; (E) the propriety of estimating damages and awarding them to the class as an entity; and (F) the propriety of using damages for a related purpose if some or all of the recovery cannot be returned to the class members.

Thus, the court could dismiss a class action when the public interest would not be served by its maintenance or would be better served by some other form of proceeding; and, conversely, could authorize the class action notwithstanding problems of manageability, when the nature and effect of the violation are such that complex procedural difficulties must become secondary. The protection and promotion of the public interest must be considered because of the necessarily "public" nature of a consumer class action—and this task can be entrusted only to the court in a private suit.

Public interest factors have already assumed important proportions in key consumer class action decisions; at times such factors have been expressly recognized, and in other instances they have been implicit in the action taken by the court. Thus, courts have dismissed class actions—sometimes ostensibly for reasons of unmanageability or the superiority of other remedies—when the violations were technical rather than fraudulent or caused minimal individual monetary harm to class members, even though such harm was widespread. On the other hand, faced with comparably serious problems of manageability (such as the likelihood that individual notice could not be furnished and that most class members might not actually seek relief or be able to prove damages), courts have authorized class actions to continue when they have found, for example, the likelihood of outright fraud or of serious antitrust violations. But a public interest determination has not yet been expressly declared to be a prerequisite to the maintenance of a consumer class action.

The specific factors relevant to the public interest determination should include the following:

A. The Plaintiff's Chance of Success on the Merits

Two Federal Courts of Appeal have held that Rule 23 does not now provide for a preliminary merits hearing. We believe that such provision would be of considerable benefit to both parties. If the court finds the plaintiff's chance of success on the merits is slight, it should have the power to refuse to certify the action as a class action. When the plaintiff's chances of success are great, the court

should be able to undertake even a difficult and cumbersome class action.

B. Whether the Class Action Represents the Most Fair and Efficient Way to Adjudicate the Controversy and Provide Redress

Rule 23 states that in order to certify a class, the court should find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Some have argued that the requirement that the class action be "superior" means that a class action should never be allowed where other adequate relief is available. Unfortunately, the meaning of the word "adequate" in this context is often unclear. A cease-and-desist order may be adequate but not nearly as fair and efficient as an action for damages in a particular case. "Superiority" should be decided by weighing the complexity and redress potential of the alternative remedy against the complexity and redress potential of the class action.

When the Congress or a state legislature had made the judgment that a given agency represents the only fair and efficient forum to handle all claims of a certain type, the court should not entertain suits brought on a matter within the exclusive jurisdiction of the designated agency. It is conceivable that various state and federal agencies will in the future adequately handle at least certain aspects of the typical consumer's problems. When that occurs, the court should defer to those agencies.

C. The Ability of the Class Representative to Protect the Interests of the Class

The court should be strict in insuring that the class representative is a good one. Rule 23 states that the class representative should have claims or defenses similar to the rest of the class and should fairly and adequately represent the interests of the class. In many cases a federal or state attorney general would be an ideal class representative. In any event, the representative should well represent all the interests of the class members. If he represents only a segment of the class, the court should certify the class only as to that segment.

In some cases the court may have to give notice to some potential class members in order to determine whether the parties before it are adequate class representatives. The greater the chance that class members may want to challenge the class representative, the more

rigorous the court should be in setting standards for notice. Obviously, a court cannot make an intelligent determination on the proper nature of the notice and identity of the addressee unless it has some fairly clear idea of the class membership. The court should not require identification of each person in the class, but if the limits of the class are so vague that it is nearly impossible to describe it, the action should not be maintained as a class action.

D. Feasibility of Giving Appropriate Notice to Members of the Class

The court should have considerable discretion to establish a sensible notice requirement. For example, a court might send notice to randomly selected members of various class subgroups, order newspaper publication, post notice at places likely to be frequented by the class members, or require the notice to be enclosed in a monthly billing statement.

In determining whether individual notice should be sent out, the court should consider the difficulty of locating individual class members, the difficulty each individual would have in proving damages, the number of claims held by people who are unlikely to pursue an individual remedy after completion of a successful class action, the cost of redressing the claim individually as compared with the amount of the recovery, the probability that some class members may want to challenge the representation or proposed settlement, and the cost of sending out the notice.

Once a settlement or judgment is reached which involves giving the class members an option of remedies, or where the remedy involves repairs or replacement, the court should give notice to as many class members as possible.

Rule 23 says nothing about who should bear the cost of giving notice. Some plaintiffs have been forced to abandon certifiable class actions solely because they could not afford to pay a comparatively low notice cost. In apportioning the cost, the court can take the parties' relative ability to pay into consideration, but this factor should not be as influential as the plaintiffs' chances of success on the merits.

E. The Propriety of Estimating Damages and Awarding Damages to The Class as an Entity Rather Than Aggregating the Claims Filed by Individual Class Members

In appropriate cases the court should award damages to the class

as an entity and not just aggregate all of the individual claims. A lump-sum determination of damages is particularly appropriate in cases in which the defendant has acquired a specific sum through knowingly unlawful conduct, and the number of class members who apply for compensation would not be great enough to strip the defendant of all of his unlawfully secured gains.

Where lump-sum damages are difficult to compute, courts should use appropriate techniques for estimating damages even though such techniques are relatively imprecise. Computation techniques should be adopted from such fields as antitrust and trademark and patent infringement law, and from the practices used by businesses themselves to compute the impact of various activities in financial terms. Courts have in fact been experimenting with ways to estimate lawsuit damages where such damages are appropriate; we endorse this flexibility. Where, however, it is feasible to compute individual damages precisely, a court should do so. Generally, plaintiffs should not be relieved of proving injury and damages merely because proof would be difficult.

F. The Propriety of Using Damages for Another Related Purpose if all or Part of the Recovery is not Practically Capable of Being Returned to the Injured Class Members.

The disposition of damages may need to be decided separately from the question of the amount of damages. The best use of the funds recovered in a class action is of course to compensate the victims of the unlawful activity. When that goal cannot be accomplished, the next best feasible use, *cy pres*, should be considered. The *cy pres* doctrine provides that when something of value cannot be put to the use for which it was intended, it should be used for the closest feasible approximation of that use. This doctrine has seen wide use in the disposition of funds held in charitable trusts in cases in which the grantor's specific purpose can no longer be carried out—as where, for example, the intended charity no longer exists. Although they have not labeled their actions as the application of the *cy pres* doctrine, some courts in class action cases have applied the doctrine. The terms of settlement of a drug sales case allowed the unclaimed funds from the recovery to go to the state attorney general for use in the public health field. In another case the settlement required a taxicab company that had allegedly set meter prices higher than the authorized rate to lower its rates below the normal rate until

the fund was used up. This latter type of distribution has been called the fluid recovery. Although it doubtless benefits some of the class members who paid unlawful fares, it also obviously benefits those who paid no such fares; to that extent it may be regarded as a form of *cy pres*.

Unless a monopoly is involved, a fluid recovery may hurt "innocent" competitors of the defendant, and could conceivably help the defendant by driving competitors out of business and attracting new customers by a court-imposed lower price. If no monopoly is involved, there is also a smaller chance of repeat business—and thus recovery—by the prior victims of the unlawful activity.

* * *

In making a final determination as to whether it should certify a class or classes, the court should weigh all of the six factors mentioned above. It will thereby be making the judgment described above as to whether it serves the public interest for the action to proceed as a class action.

At the preliminary hearing the parties should produce some evidence, much as is done in applying for a preliminary injunction. However, the preliminary hearing should stop considerably short of a full-blown trial. Despite the preliminary hearing, unexpected problems may arise during the course of the litigation; but at least the court will not spend an inordinate amount of time on a case that could have been early dismissed as unfit for class action treatment. Defendants will be able to rid themselves of vexatious or inappropriate class action cases before expending a great deal of time and money.

Even if the judge decides to certify a class after the preliminary hearing, the hearing will still have been of value. The judge and the parties will at least have been exposed to the often complex procedural issues and difficulties that may later arise during the course of the class action litigation; they will not be leaping into the dark. Moreover, parties may be more willing to settle early if they know the judge's thinking on the principal issues that will eventually arise.

In short, by providing a preview of the case, a rather wide-ranging preliminary hearing can help the parties and the court to make intelligent and informed decisions relating to the case before an inordinate amount of time and money has been spent.

38. THAT COURTS SHOULD FREELY GRANT INTERLOCUTORY APPEALS FROM DECISIONS CERTIFYING OR REFUSING TO CERTIFY CLASS.

Often the court's decision on the issue of certifying a class is the end of the lawsuit. That is, if the plaintiff fails to get his class certified, he may quit; if he succeeds, the defendant may decide to settle. Until the law on certification of the class action is more settled, we believe both parties are better served by the availability of appeal at this point in the proceeding. It will minimize each party's ability to coerce the other into an undesirable settlement because of an unwise decision of the trial judge.

39. THAT GENERALLY NEITHER PUNITIVE NOR UNLIMITED "MINIMUM" DAMAGES SHOULD BE ALLOWED IN A CLASS ACTION.

In most cases, an award of actual damages to members of the class will provide sufficient incentive to businessmen to avoid the commission of similar wrongs in the future. The litigation incentive of punitive or "minimum" damages (such as those proviced by §130 of the Federal Consumer Credit Protection Act) should only be used when an individual litigant must undertake an individual trial of his claim; its application in a class suit may result in a total award out of all proportion with the wrong committed. Some legislatures, however, have established minimum damages for cases in which actual damages are not easily measurable. Where such damages are allowed in a class action, there should be a formula (e.g., the greater of a fixed dollar amount or a small percentage of net worth) establishing or limiting the size of the class award.

40. THAT A SUCCESSFUL PLAINTIFF IN A CLASS ACTION CASE SHOULD BE AWARDED APPROPRIATE ATTORNEY'S FEES AND THAT THE COURT SHOULD WITHHOLD OR LIMIT THE AWARD OF ATTORNEY'S FEES FOR THE PLAINTIFF'S LAWYER IF THAT LAWYER HAS ENGAGED IN UNFAIR OR UNETHICAL ACTIVITY.

THAT THE COURT SHOULD AWARD ATTORNEY'S FEES TO THE DEFENDANT ONLY WHERE THE

PLAINTIFF'S CASE WAS FRIVOLOUS AND WAS BROUGHT PRIMARILY FOR THE PURPOSE OF COERCING A SETTLEMENT FOR THE ATTORNEY'S MONETARY ADVANTAGE.

Although the traditional American rule is that each side pays its own attorney's fees, that rule has been considerably modified in some areas of the law. Where one side is awarded attorney's fees from the other, the court supervises and sometimes sets their amount. We believe that the court should exercise such supervision in class actions, whether the fees are awarded directly from the defendant or from the fund (and regardless of whether the fund was created by a judgment or a settlement). In making its determination as to the amount of the fee, the court should take into account the skill of the plaintiff's lawyer, the risk taken in prosecuting the action, and the difficulty of the work performed. Attorneys' fees should be available in appropriate cases to all lawyers, including legal aid and legal services attorneys, and the criteria for fixing their amount should be standard.

It is at least possible that the amount of fees plaintiffs' lawyers are able to recover will be a significant factor in determining the frequency of consumer class actions. If it develops that any complaint will produce a handsome fee for the plaintiff's lawyers, too many plaintiffs and plaintiffs' lawyers will be attracted to the market and so-called strike suits may be encouraged. On the other hand, if the plaintiff's lawyer sees several years of work ahead of him and faces the possibility that he will recover no fee at the end of that time, the cases that should be brought may not be. Thus, we believe attorneys' fees are particularly important, both for the courts that handle these cases and for those who examine them with an eye to determining whether the consumer class actions should be expanded or contracted after an experimental period.

Under the standards set out above it will be a comparatively rare case in which the defendant will recover attorney's fees from the plaintiff. Before it makes such an award, a court should find not only that the plaintiff's case was frivolous, but also that it was brought for the purpose of coercing a settlement for the plaintiff-attorney's monetary advantage. We do not automatically classify as "frivolous" test cases that raise novel but ultimately unsuccessful legal arguments.

SEPARATE STATEMENTS

SEPARATE STATEMENT OF ANTONIN SCALIA

The existence of separate statements poses two problems for those who, like myself, are in substantial agreement with the body of the Report. First, it creates the erroneous impression that those who have not chosen to register dissents agree with every item. I wish to emphasize that that is not the case. The Report is a group product. Each statement it contains has the support of a substantial majority of the Board, but beyond that attribution is unjustified. No individual member can be regarded, by reason of his failure to file a separate dissent, as necessarily subscribing to a particular point. At most, his failure to write or to join a dissent may indicate a relative lack of vehemence in his opposition—and even this is a questionable conclusion, since equivalent vehemence may be accompanied by varying measures of time, energy, loquaciousness and the maverick instinct. Suffice it to say that the Report is not what I would have written if I had written it alone; nor, if I can judge from the vigorous discussions in our meetings, could it have been written individually by any of our members.

The second problem raised by separate statements is their attribution to the Report of positions that others, who endorse it, do not believe it contains. In this regard, I wish to note my view that our recommendations concerning class actions do not eliminate restrictions to the extent suggested by the separate statement of Mr. Millstein. It is indeed our very refusal to permit a class action to proceed without consideration of such factors as the gravity and wilfullness of the wrong, the inability to give notice to all injured persons, the difficulty of assessing damages, and the feasibility of directing the funds back to those who have been injured—it is our very refusal

to allow class actions without regard to these factors that has drawn the criticism of Messrs. Shick and Clendenen in Part III B of their Separate Statement. Our Report merely asserts—I think correctly—that these factors cannot be considered in the abstract, nor in isolation from one another, but must be weighed together in the concrete factual context of a particular suit. This is the heart of the preliminary "public interest" determination that we urge to be made.

I will not dwell at greater length upon what seem to me exaggerations in Mr. Millstein's description of the Institute's position. I will note, however, that there is no inconsistency between (a) reservation of judgment concerning the ultimate utility of the class action as a device for redressing consumer grievances and (b) determination that certain unsound limitations upon the device should immediately be eliminated. What the Institute calls for is a 5-year period of experimentation. That experimentation can produce no sound conclusions if it is conducted under conditions that guarantee its failure. It was therefore my view, and that of the Institute, that the clearly unsound limitations as well as the clearly unsound extensions of the class action device should be eliminated at once.

SEPARATE STATEMENT OF IRA M. MILLSTEIN

The Report of the National Institute of Consumer Justice addresses itself to four principal methods of resolving consumer grievances: Business Sponsored Mechanisms, Arbitration, Small Claims Courts and Consumer Class Actions. I am in substantial agreement with the recommendations of the Institute as they relate to the first three of these areas which, I believe, hold out the greatest promise for a quick, fair and efficient system of redressing consumer grievances. While a sincere effort was made by all to reach some consensus on the highly controversial class action issue, I nevertheless continue to have serious reservations as to the sufficiency of the inquiry conducted by the Institute concerning the class action, and whether the class action will best serve the goal of redressing consumer wrongs.

The Institute's Report on class actions begins with an acknowledgement of the fact that the class action is not only the most controversial judicial remedy, but a device which is subject to abuse and whose cost may ultimately come to rest on the shoulders of the consumer. The Report further acknowledges that little is known about many aspects of class actions, that one needs to know much more

to make an intelligent long-range decision about the merits of the consumer class action, and that a five-year experimentation period is required to "determine whether the use of the class action should be expanded, contracted or otherwise modified." I share this view.

Although hardly considered in the Report, the potential abuses and anti-social consequences of the class action have been the subject of much discussion in a variety of forums. To summarize, they include: the potential for staggering damage awards; the substitution of statutory penalties or "minimum damages" for proof of actual injury and extent of damage; the tendency to institute suit against larger, financially stable companies for unintentional, highly technical violations of vague and ambiguous legal standards—motivated by the prospect of substantial attorneys' fees rather than the cure of actual abuses; the inherent potential of the class action for inducing coercive settlements, irrespective of the merits of the claim; and the consequent chilling effect on product development, marketing practices or generally accepted methods of doing business.

The factors noted above may be serious problems for the consumer as well as the businessman. They can transform what is intended as a vehicle for securing consumer redress into what one commentator has called an "engine of destruction" and another has termed a device for "legalized blackmail." At a minimum they can lead to substantial increases in costs, all of which the Report indicates may ultimately come to rest on the shoulders of the consumer.

In apparent recognition of these problems the Institute makes a number of recommendations with which I am in complete accord. These include the abolition of statutory penalties or minimum damages in the class action context and the holding of a preliminary hearing on the merits to weed out frivolous but expensive suits. The Institute also proposes a period of experimentation which will, on the basis of the experience gained, facilitate a determination of whether the class action should be expanded, contracted or otherwise modified.

The Report, however, goes on to make a number of so-called "in the meantime" suggestions which would vastly enhance the potential for abuse and which would primarily be achieved by altering the traditional function of civil litigation. (By having the class action serve as a deterrent rather than as an instrument for the redress of actual injury—and by sacrificing the rights of the parties in connection with such litigation.)

I, for one, find it difficult to understand how the Institute can

appropriately urge a gross expansion of the class action in the consumer area without at least determining whether the class action can in fact provide a satisfactory remedy for consumer grievances in the first place, and under what circumstances this can best be accomplished—information which the Institute had candidly acknowledged it lacks at this time. The consumer class action surely cannot be the most suitable or best available mechanism for the cure of every alleged wrong. Among other things, we know that it is burdensome, time consuming and expensive for all concerned. Until there has been a critical analysis of the advantages and disadvantages of the consumer class action as a remedial device; until we have examined its present utilization in both federal and state courts, its effectiveness in affording actual relief, the categories of consumer abuses where it could prove effective, its relative merits as a remedial device as compared to alternative techniques which may or could be available to remedy the same wrong, I do not believe we can determine whether the class action ought be expanded, contracted or otherwise modified.

But further, I do not believe that the goal of consumer redress is served by the elimination of individual notice to alleged members of the class, "lump sum" monetary awards computed for "the class" as a whole, "damages" levied on the basis of "estimates" and the appropriation of unclaimed funds for public purposes. Such proposals, I believe, reflect the concept of class actions as a punitive, quasi-criminal device intended primarily to deter alleged wrongful conduct by inflicting severe loss on the alleged wrongdoer regardless of whether any consumer redress will be effectuated. That is, the class action becomes primarily a weapon for deterrence and only secondarily, if at all, a means for securing redress of actual consumer grievances.

I question whether the consumer interest is truly best served by a class action model not primarily intended to secure redress. And, even assuming that the goal of the consumer class action were deterrence, I have equally serious reservations about the ability of the Institute's proposed model to achieve that goal. Finally, I am most concerned that the Institute's proposals would greatly intensify the class action's propensity for harm and could only increase the number of class actions brought for invalid or socially unworthy purposes. Actions of of this type, I believe, would be positively detrimental to the consumer, among other ways, by requiring businessmen to assume substantial litigation expenses or bend to settlements whose

costs will utlimately be borne by the consumer in the form of higher prices, charges or restricted options.

The traditional role of the private suit is to provide an adequate remedy to genuinely aggrieved parties who have a real interest in securing redress. Thus, as I see it, the consumer class action has merit when numerous identifiable persons are interested in redressing injury and damage actually sustained by reason of conscious wrongdoing, but the damage to each consumer is too small to justify the effort or expense of an individual lawsuit. In such a situation, it seems fitting that a single individual should sue for himself and as "representative" for all other injured persons interested in redressing their grievances. However, if the parties do not have a sufficient interest in securing redress, then I question whether the courts are the appropriate forum for a resolution of the grievance. And this, of course, is precisely the result of the proposals urged by the Institute—suits for unidentified class members, who are not advised that a suit is pending on their behalf, who may not have sustained injury or have no interest in the suit and who, in all events, may receive no individual redress.

Turning to the subject of deterrence, it is doubtless correct that the risk of a class action can serve as a deterrent. But before we can conclude that efforts should be made to promote the use of class actions as a deterrent, I think we must first ascertain which businessman will be so deterred, and as to which consumer wrongs. Based on my observations, I would guess that those businessmen who most need to be deterred from engaging in consumer abuses are in fact the least likely to be proceeded against in class actions.

Experience has demonstrated to me that the consumer class action is rarely employed to challenge hard-core fraudulent practices which the perpetrator knew or had reason to believe were illegal. The reasons for this are varied: hardcore fraudulent practices may lack the commonality required for a class action or the violator may be difficult to find or unable to respond to a substantial monetary award. Thus, conduct which conceivably could and should properly be deterred may well be left largely untouched by the class action. Rather, the class action seems to be most frequently brought against those with the deepest pockets for highly technical, often debatable violations of vague and ambiguous legal standards—against those who may have made a genuine effort to comply with the law but who allegedly failed in some respect which may not have been reasonably predictable

at the time the conduct was undertaken. Not only will the imposition of sanctions fail to deter such conduct but it is precisely such actions—actions which do not seek to right any substantial wrong or redress any real injury—which create the greatest potential for abuse.

But further, as I see it, a system which has as its object deterrence through the imposition of extreme sanctions is defensible only if mechanisms are provided to protect the innocent, and to restrict its application to knowing wrongdoers. It is clearly unreasonable to expect counsel, responding to the inducement of financial gain, to discharge the responsibilities of a public prosecutor or to select cases with regard to the seriousness of the wrong rather than the recovery potential.

Much of my objection to the Report, therefore, lies not only in its failure to thoroughly consider the impact of the class action, but in its seeming insensitivity to the demands of individual justice; with the preconceived notion that class actions are *per se* beneficial without regard to whether they are in fact an effective remedy for redressing consumer grievances; with the apparent willingness to dispense with proof of injury and damage, to sacrifice fundamental rights of the parties.

More particularly, I believe that most of the attractiveness and popularity of the class action can be traced to the assumed genuineness of its unarticulated major premise. Namely, that the individual plaintiff really is "representative" of significant numbers of other persons who consider themselves aggrieved by the matter complained of, and are desirous of securing redress through an action undertaken on their behalf. Where the matter complained of involves serious overreaching or conduct of a sort calculated to create widespread consumer resentment, the plaintiff's claim to "representative" status and the potential of a huge monetary award may well be warranted. On the other hand, where the complaint reflects a highly personalized reaction, or where it seeks to exploit a purely technical violation of *de minimis* social consequence, or other petty transgressions involving no significant public interest, the plaintiff's claim to represent a class suffering injury and desirous of effecting redress through litigation, is subject to question.

The Institute, however, has not limited its recommendations for expanded class action availability to serious wrongdoing. Indeed, it has not even considered the substantive basis of the actions to which its proposed liberalized procedures would apply. To view the class action solely as a procedural device, is a serious error. Careful atten-

tion must be paid to the nature of the conduct upon which a class action may be based. Whatever its rationale, the consumer class action should not be permitted for alleged violations of vague and ambiguous legal standards but only for clearly defined conduct whose illegality was known or reasonably predictable. Clearly, a businessman cannot be deterred from engaging in conduct which he has no reason to believe is improper. And, absent predictable wrongdoing, the potential of a class action may well have that chilling effect on new product development or innovative marketing practices which I noted earlier. Such a safeguard is further required to discourage frivolous suits, minimize abuses and create a situation where benefits of the class action will possibly outweigh the costs from a social and economic standpoint.

I am equally concerned that the goals of individual justice are not well served by the Institute's recommendations with respect to notice and damages. These recommendations, I think, create a potential for a situation which should properly be avoided—the lawsuit of little, if any, merit, instituted for its coercive or nuisance value, on behalf of an unidentifiable and possibly disinterested class who will receive no benefit from maintenance of the action.

Present class action procedure casually assumes that all class members wish to participate unless they exercise the right to "opt out," i.e., indicate affirmatively that they do not wish to participate in the suit. This problem of *non-consensual* joinder—the purely passive or vicarious involvement of large multitudes in lawsuits commenced ostensibly for their benefit but without their consent—creates a serious potential for abuse. It also leads to many of the other problems associated with the consumer class action—problems of manageability, duplicative and overlapping actions, proof of injury and damage, the difficulties of settlement and the effect of a determination on the merits—problems which I believe have not been adequately considered by the Institute and which are further heightened by the specific "in the meantime" recommendations.

Thus, the Institute suggests that individual notice to all identifiable class members need not be required when the claims of class members are difficult or impossible to prove, held by people unlikely to pursue an individual remedy even after the successful conclusion of a class action, or too small to warrant the cost and time of redressing them individually. Contrary to the position expressed in the Report, it seems to me that the only justification for consuming substantial and valuable

court time to adjudicate class actions involving small individual claims, would be to provide a forum for what proponents claim to be a societal need to *remedy* such claims. If a class action will not provide such a remedy, another method of solving this social problem must be found.

The suggestion that class actions should be promoted as a consumer "remedy" despite their inability to provide recoveries to members of the class, also pervades the Report's discussion of damages. It is suggested that the courts should award damages to the class as an entity, rather than on the basis of the claims of individual class members, and should accept damage calculations based upon rough estimates. Surely, such proposals are not only inconsistent with the concept of individual redress, but are equally inappropriate for private litigation. The object then becomes exclusively one of punishment. I have serious reservations as to whether the right to penalize companies for their wrongdoing should be turned over to private litigants, particularly for amorphous and inadequately defined wrongs.

The Report further suggests that where funds recovered cannot be returned to the alleged victims of the unlawful activity (presumably because most class members will not submit their recovery claims), the damage "fund" should be disposed of for some "next best" feasible use. Again, I question this approach to private litigation and the unsupported assumption that, because courts find it difficult to deal with class actions, both procedural and substantive short cuts, which destroy traditional litigation protections, are necessary or desirable. Such suggestions, I believe, lend credence to the view of the class action as a "clientless" lawsuit, instituted for personal motivation, or for individual gain.

Of equal importance, the concept of substituting the class as a whole as the real claimant, is a radical departure from traditional notions of the role and function of the private action. A class is merely a procedural device for joint adjudication of common questions. It is not a legal entity entitled to recover damages in its own right. Only individual persons who have been actually injured have such a right. This was apparently the basis for the Supreme Court's decision that individual damages may not be aggregated to reach the minimum jurisdictional amount of the federal courts.

In short, if alleged members of the class need not be identified or given individual notice of the action, if the standards for proof of injury and damage are to be relaxed to eliminate the requirement

for individual proof of injury, and if unclaimed funds are to be disposed of on a *"cy pres"* basis, the potential of the class action for abuse will be intensified, and its ability to redress genuine consumer grievances in a prompt and economical manner seriously curtailed. It will simply become immaterial whether the plaintiff "represents" anyone other than himself, whether the plaintiff's grievance was real or fancied, or was of such a nature as to be of even casual interest to the other supposed "victims."

Some of the problems identified above can, I believe, be eliminated or minimized by a requirement that those claimed to have been injured affirmatively indicate their interest in securing redress. Such a requirement would seem better calculated to insure that the class action truly performs the function of redressing actual grievances and would help to curtail the abuse of the class action by persons who assert false claims or claims having no significant public interest, since the case will most likely not proceed unless the action is of such a nature as to generate sufficient response. Many of the problems of "manageability" might be alleviated if the class were limited to those affirmatively signifying an interest in participating actively in the action. The potential for huge monetary awards inuring to the benefit of no one in particular would be reduced. Notice given at various stages in the proceeding would be easier and less expensive if it need only be sent to known recipients rather than to myriad unknown persons fitting the class description. Similarly, discovery and counterclaims against the class would be practical, and the pressure to restrict the right of the defendant in order to accommodate a class of disinterested unknown persons would be eliminated. Settlement offers could be intelligibly tendered and evaluated in the "opt in" case, since the potential recovery at trial could be computed.

There are other recommendations in the Institute's Report whose implications have not been the subject of critical analysis and with which I am not in accord. The recommendation that damage claims be aggregated to meet the minimum jurisdictional requirements of the federal courts, rejected by the Supreme Court following a careful evaluation of its implications for the legal system is, I believe, in this category, as is the recommendation that there be no demand for a voluntary resolution of grievances prior to the institution of a class action. Indeed, the Institute itself recognized that litigation is not the preferable mode of redressing consumer grievances and that the class action is appropriate only in those cases in which the

prospective defendant does not itself redress the wrong. While time does not permit an exhaustive analysis of each of the matters contained in the Report, the subjects discussed above are those which give rise to the greatest concern and which prompt this separate statement of views.

SEPARATE STATEMENT OF PHILIP ELMAN

I do not concur in the recommendation that parties to small claims court cases should be denied the right to be represented by counsel.

As a practical matter, collection agencies and other corporate and "professional" litigants will not be hurt by the ban on lawyers; they will have no trouble finding non-lawyer employees to handle their cases just as well, if not better. On the other hand, consumers, especially if they are poor, illiterate, or terrified by the machinery of justice, may need legal assistance not provided by or available from court aides.

Underlying the Board's recommendation is the fear that the presence of lawyers in small claims courts will impede informality and expedition. The remedy it proposes, however, is worse than the disease.

If small claims courts are properly run in all other respects, the need for a lawyer should arise only infrequently. When it does arise, however, it is insufficient justification for depriving a party of the assistance of counsel to say that the lawyer must be kept out because he will inevitably obstruct the proceeding. The same kind of argument could be made in criminal and, indeed, other kinds of proceedings, judicial and administrative, to justify denial of the basic constitutional right to counsel.

May we not depend on small claims court judges to establish and maintain an atmosphere in which lawyers will help, rather than obstruct, the course of justice? Is there no reason to hope that lawyers (or, at least, the next generation of them) will learn that small claims court is not the place to keep popping up with objections, exceptions, etc.? Whatever harm may result from the presence of lawyers in small claims courts seems to me to be outweighed by the right of a party to have the assistance of counsel in presenting his case.

SEPARATE STATEMENT OF ROBERT B. GILL AND CHARLES E. HAMMOND

The primary mandate of the National Institute for Consumer Justice was to study the adequacy of existing procedures for the resolution of disputes arising out of consumer transactions. In discharging that mandate, we believe that the Institute has made constructive and meaningful recommendations, after a thorough study, in the areas of: Business Sponsored Mechanisms, Arbitration and Small Claims Courts. Accordingly, we generally endorse the Institute reports on these subjects, and we feel that they merit serious consideration by those interested in achieving simple and effective consumer grievance handling procedures.

The Institute report on the consumer class action contains some worthwhile recommendations, such as those concerning a preliminary hearing and the inappropriateness of a class action in suits for statutory penalties or minimum damages. Nevertheless, we find the balance of the report a considerable disappointment. While the report concedes that insufficient empirical data is available on this complex device, whose expansion would have far reaching and possibly adverse consequences to consumers and business alike, it is replete with recommendations for its expansion. We are not persuaded that the class action is necessarily the best mechanism for the resolution of consumer grievances, and believe that further study is indicated.

For the reasons stated, we feel it appropriate to file this statement concurring in the separate statement of Mr. Millstein.

SEPARATE STATEMENT OF BLAIR SHICK AND WILLIAM CLENDENEN

The National Institute for Consumer Justice focused its inquiry on only certain procedural aspects of our system of justice, *i.e.* considerations relating to the availability of a convenient forum for potential redress of grievances. Recommendations set forth in this Report offer significant improvements to the present system, as to both the availability of a convenient forum as well as the quality of that forum. To that extent, but subject to the exceptions noted below, we support these recommendations and urge their immediate implementation.

We do not believe, however, that implementation of these recommendations will significantly improve the lot of American consumers

in today's marketplace. Although admittedly imperfect, various dispute resolving mechanisms have been available to consumers throughout our economic history. Yet there is no evidence to suggest that recovery by consumers through any of these mechanisms has provided business interests with the incentive to curtail those practices which give rise to disputes.

The problem, we think, lies with the excesses of our economic system, not with the failings of dispute resolving mechanisms. If consumer justice is to be truly obtained we need measures designed to prevent disputes in the first instance. Controls must be found for advertising which prevent not only the false and misleading but also the constant manipulation of consumer demand. As technology renders our products more complicated, better means of quality control must be required. Unsafe products should be prevented from reaching the market in the first instance. Fuller disclosure must be made available to consumers, including, in the the case of appliances and automobiles, the expected life span of such products under normal usage.

The list could go on and on. The achievement of these and other reforms, however, is dependent upon the extent to which our political institutions can avoid the influence of concentrated economic power and freely respond to the needs of the public. It is not likely to expect that the multinational corporations which dominate our system will implement these reforms merely because a group of consumers sought recovery in small claims courts or even by class actions.

The improvements which lie at the heart of the recommendations of this Report, therefore, even if conformed to the exceptions noted below, do not promise full consumer justice for they do not get to the heart of the problem.

I ARBITRATION MUST BE CAREFULLY STUDIED BEFORE IT CAN BE CONSIDERED HELPFUL TO CONSUMERS

As an alternative to judicial resolution the use of arbitration has an admitted potential for alleviating crowded court dockets. Except in the single instance of the Small Claims Division of the New York City Civil Court (where arbitration is available to claimants on a voluntary basis) nothing examined by the Institute shows that arbitration offers any particular advantage for consumers that shouldn't

be present in a properly functioning court system. The fact is that so very little is known about the use of arbitration for consumer problems as to question the validity of the Institute's recommendations on this question.

The only instances where mandatory arbitration is currently being used for consumers with any degree of regularity is with certain specialized insurance cases: uninsured motorist's provisions in several states; damage to household goods from intra-state moving in New York; and no-fault auto property damage in Delaware. Assuming arbitration works adequately for consumers in these situations (we do not really know), it is important to recognize that the nature of these disputes is extremely limited. All aspects of these insurance transactions—the particular governing contractual provisions, the rates charged to the public, and the qualifications of the company to do business—are closely regulated by the state. The right of the insured consumer to recover is clearly defined. The only issue to be arbitrated is that of the measure of damages.

By contrast, most consumer disputes do not involve businesses that are as closely regulated as these specialized insurance situations. The measure of damages is seldom the sole legal issue involved in such problems. More frequently, consumers need determinations as to the propriety of business conduct. We have not seen that arbitration has the capacity to make such determinations efficiently and in the interests of the consuming public.

In light of the unknowns surrounding arbitration we cannot endorse these particular recommendations. We are particularly fearful of legislation which would force arbitration upon consumers by virtue of unknown fine print in standard form contracts. And we would strongly urge that arbitration be carefully studied for the potential offered to consumers before it is injected into any new legislation purporting to confer consumer rights.

Finally, we cannot accept the notion inherent in Recommendation 8 that there be a condition precedent to resort to a formal dispute resolving mechanism. Where a formal mechanism is provided, be it arbitration or litigation, there should be no requirement that a consumer first exhaust internal business procedures. By definition a consumer with a complaint is upset with that company's procedures. To require him to subject himself further to that company's bureaucracy is to compound the problem, not to solve it.

II SMALL CLAIMS COURTS SHOULD NOT BE AVAILABLE TO CORPORATE PLAINTIFFS

The Report notes the widespread concern that existing small claims courts have become "collection agencies for professional creditors." In light of the recommendation that such courts be readily available to corporations as well as individuals, we feel that the total effect of all improvements recommended will be to increase that problem, not to alleviate it. Specificially, we feel that increasing the jurisdiction of small claims to $1,000 (Recommendation 14), minimizing the legal documents required and allowing service by mail (Recommendation 17), and prohibiting the use of lawyers (Recommendation 27) will facilitate the interests of creditors. All of these improvements are desirable to encourage consumer use of these courts. They will not achieve that goal, however, as long as corporate manipulation perpetuates the tradition of the small claims court as a rubber stamp for collectors.

Of particular significance here is the recommendation prohibiting lawyers. Finance companies, utilities and other creditors who regularly utilize limited jurisdiction courts have ready access to legal counsel. Thus, a creditor's collection representative, although not a lawyer, can be easily trained to function effectively in court against the untrained consumer. At any moment legal counsel for the creditor is no further than the phone. To remove lawyers from small claims courts, therefore, is to levy a handicap on consumer defendants and further alienate them from the legal process. At the same time corporations will be more than happy to be freed of the requirement present in many states that they must retain counsel to appear in court.

The solution, however, is not one of permitting lawyers. The problem is one of business domination of public institutions. That permitting corporations to sue as plaintiffs makes substantial impact on the consumer patronage of small claims courts is readily apparent from studies conducted on behalf of the Institute. The cities of New York, Los Angeles and Philadelphia each have courts with a jurisdictional limit of $500. The Los Angeles court (which appears substantially similar to the kind of court recommended in the Report) prohibits lawyers but allows corporations to sue. Philadelphia allows both corporate plaintiffs and lawyer representation. But the New York court prohibits both lawyers and corporate plaintiffs. Significantly, an estimated 40% of the 70,000 cases brought by natural persons

in the New York court in 1971 were "consumer" cases. By contrast only 14% of the Los Angeles docket over the period of time studied (May 15-July 31, 1972) consisted of cases brought by consumers. In Philadelphia, figures of 6 and 9 percent "consumer" cases were reported respectively for September and December of 1971. While figures for corporate collection activity were not presented in these studies, a 1963 study in California of the Oakland-Piedmont-Emeryville (Alameda County) small claims court revealed that "business and government interests intitiated sixty percent of all actions and individuals defended more than 80 percent of them." Comment, 52 Calif. L. Rev. 876, 884 (1964).

These data are not directly comparable in that considerable variables exist among the studies. Also, we have not seen the Boston and Detroit studies conducted on behalf of the Institute. The discrepancy of consumer usage between the small claims courts of New York City and those of other urban areas is sufficiently glaring, however, as to show the undesirable consequences of allowing corporations to appropriate the facilities of the court to their own uses.

In this regard we are not persuaded by the Institute's cautious reservation in Recommendation 9 that "some courts may wish to limit the number of cases that any one plaintiff can file within a specific period of time or to limit professional creditors' use of the court to certain hours or days." The problem here is not just one of overcrowding or conserving scarce resources for priority matters. What is more important is the issue of institutional adaptation to the nature of the interests being served and the resultant image projected to the community at large. We believe that no amount of procedural restrictions, except an absolute bar against corporate plaintiffs, will prevent a small claims court from being dominated by corporate interests.

Once a majority, or even a plurality, of the court's case load becomes business oriented the natural tendency of all personnel concerned will be to accommodate those interests. The collection representatives for individual corporate creditors will appear again and again. The personal relationships which gradually evolve from such frequency of contact will then be prevailed upon by the collectors for administration of the court in their interests. This is the very process of adaptation which has given rise to the present small claims of rubber stamp for bill collectors. We believe it is that image which, more than any other single factor, dissuades consumers from pursuing

their rights in such courts. We conclude, therefore, that the essential prerequisite to a successful functioning of a small claims court as a consumer dispute resolving mechanism is a complete bar against corporate plaintiffs. Since we do not see the same problems arising from infrequent use of the court by small businesses we do not recommend that this prohibition extend to include unincorporated organizations.

III CLASS ACTIONS:

A. The Federal Courts Should Be Available for Consumer Class Actions Arising from Illegal Practices Which Affect Interstate Commerce

We concur generally in the Institute's cautious endorsement of consumer class actions. The class action device is probably the law's most effective tool for deterring misrepresentation, breaches of warranty and other violations of consumer protection laws. In the modern era of mass manufacturing and mass merchandising, a mass remedy is necessary if consumer justice is to be obtained.

Unfortunately, some state courts have generally rejected consumer class actions. We hope that this report will encourage them to reconsider their views. Meanwhile, we share the hope of the Institute that Congress will permit a class of consumers to aggregate their claims in cases involving diversity of citizenship, so that they will meet the $10,000 jurisdictional minimum for federal actions. We would regard such Congressional action as a helpful first step. But if Congress shares our view that the state courts have been insufficiently receptive to class actions, it should also invest the federal district courts with subject matter jurisiction over consumer class actions arising from violations of state law. It might begin by opening the federal courts to suits by classes of consumers injured by misrepresentation or breaches of warranty with respect to goods or services that have moved in interstate commerce or the sale of which affects commerce.

Further, Congress should mandate that violations of existing Federal statutes regulating commercial activity, *e.g.* an unfair or deceptive practice prohibited by Section 5(a) of the Federal Trade Commission Act, gave rise to a federal right of recovery on behalf of a class of consumers injured by these violations. Presently many of these statutes confine enforcement exclusively to the activity of an adminis-

trative agency. However, the best of these agencies have limitations on the resources available to police the business practices in question. Authorizing consumer class actions for the damages suffered as a result of practices prohibited by federal law is an initial step toward achieving the goal that consumers receive redress for their grievances and that business be deterred from undertaking illegal practices.

Some argue that consumer cases are too trivial to be heard in the federal courts. But ours is a national economy, and we cannot characterize as trivial violations of consumer laws that injure hundreds or thousands of persons at a time, even if each such person loses only ten or fifteen dollars. The federal courts routinely hear cases brought by businessmen involving interstate commerce: antitrust, interstate freight, patent, securities, trademark and perishable commodities cases, among others. Suits to redress violations of consumers' rights are no less important.

B. There Is No Need for a Finding of Public Interest Before Consumer Class Actions Can Be Maintained.

Finally, we cannot accept the principle inherent in Recommendation 38 for Class Actions that a determination be made that a consumer class action is in the "public interest" before it be allowed to be maintained. We agree that a preliminary determination of the kind set forth in that Recommendation should be made. However, we do not agree that there is a gloss over the six factors enumerated which brings an entirely new and separate set of considerations into play under the guise of the "public interest."

Consumer class actions are private actions, brought by and against private parties to redress injuries rising from purely private transactions. It is in the public interest to allow such actions just as it is in the public interest to allow any other redress for injuries resulting from illegal behavior. This public interest is automatically defined every time legislation is enacted creating a cause of action for relief. We see nothing unique about consumer class actions which support a requirement for an additional "public interest" finding. This is not an element which is present in any other authorized action.

If a proposed consumer class action meets the legal prerequisites articulated in Recommendation 37, it should be maintained without entertaining further debate as to just what is in the public interest and why. A problem which has plagued consumer class actions in

the past has been the confusion arising from attempting to apply the seemingly rigid requirements of Rule 23 of the Federal Rules of Civil Procedure. In attempting to avoid this confusion some courts have reached results suggesting the need for a public interest determination. That need was suggested because of the shortcomings of Rule 23, not because such an element is or should be present. The preliminary determination recommended by the institute, in conjunction with the flexibility urged for the individual criteria to be considered for a class action, was intended to avoid these shortcomings, thus eliminating any need for additional elements.

We feel that the injection of this new element of the unknown "public interest" will only further cloud an inherently complicated issue. Its existence will serve only to delay determination and invite needless appeals, thereby discouraging the bringing of such actions in the first instance. Since we cannot find justification for its existence we urge that the determination requiring a finding a public interest be eliminated from these recommendations.

SEPARATE STATEMENT OF GAIL S. BRADLEY

I concur in part III, but not in parts I and II, of the Shick-Clendenen separate statement.

SEPARATE STATEMENT OF HELEN NELSON

I dissent as to the $1,000 limit on small claims court jurisdiction. I believe that amount is too high.

I concur in part III, but not in parts I and II, of the Shick-Clendenen separate statement.

SEPARATE STATEMENT OF JEAN CAMPER CAHN

I concur in parts II and III, but not in part I, of the Shick-Clendenen separate statement.

SEPARATE STATEMENT OF DAVID CAPLOVITZ

I concur in parts I and III, but not in part II, of the Shick-Clendenen separate statement.